No. 11,282

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, FOR THE USE OF RECONSTRUCTION FINANCE CORPORATION, A FEDERAL CORPORATION, ACTING IN BEHALF OF DEFENSE PLANT CORPORATION, A FEDERAL CORPORATION, APPELLANT

v.

SAM BLOCK, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR THE UNITED STATES

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For convenience of reference this reply brief will discuss appellee's contentions under the headings of the Government's opening brief.

I

THE IMPROVEMENTS USED IN PRODUCING OIL SUCH AS WELL CASINGS AND DERRICKS WERE TAKEN IN SEPTEMBER 1942

A. The improvements were condemned as of September 28, 1942, under the original complaint

It is the Government's position that the improvements here involved were fixtures which were in legal contemplation part of the real estate (Br. 21–25) and were, therefore, included in the original complaint

as part of the property taken (Br. 25–27). The contentions by which appellee seeks to support a contrary conclusion are, we submit, plainly erroneous.

Appellee asserts (Br. 33–37) that this was a factual question, that the burden of proof was upon the Government and that no evidence was offered to support the Government's claim. On this ground appellee seeks to distinguish some of the authorities relied upon by the Government. And, referring to paragraph XIV of the amended complaint, the Government's contention is asserted to be "an afterthought" (Br. 33) and it is stated (Br. 33) "it *must be assumed* that the appellant did *not* ascertain *or contend* that the questioned items *were in fact a part of the realty* or fixtures." (Emphasis by appellee.) These assertions are, however, directly contradicted by the record. The telegram, plaintiff's exhibit No 3, which appellee claims was simply a statement of opinion on a question of law (Br. 41), states (R. 77–78) "Some of items included in Exhibit C, including oil drilling equipment, were thought to be part of realty so as to have been acquired upon filing of Declartion of Taking." Nor did the amended complaint constitute a waiver or abandonment of this position. On the contrary, it stated (R. 28):

> That plaintiff is unable to determine at this time how much of the property generally described in the last preceding paragraph is to be deemed part of the real property on which it is located, for the reason that plaintiff does not now know the terms of the oil and gas

> leases under which said property was placed upon the premises for the purpose of producing oil and gas therefrom; and plaintiff therefore designates all of said property as personal property and trade fixtures, *solely for the purpose of identifying the same as part of the property to be taken in this proceeding,* and will ask leave of Court to amend this complaint accordingly if and when it shall be ascertained that any of the property herein designated as personal property and trade fixtures is, in fact, part of the realty upon which it is located. [Italics supplied.]

The occasion for filing an additional amendment has not yet arisen since the trial court has not determined that the fixtures were part of the realty.[1] The Government's position was thoroughly understood by all parties at the trial and there was no suggestion made that the contention had been abandoned (see, e. g., R. 70).

Appellee's contention that the issue is a factual matter upon which the Government failed to sustain the burden of proof [2] is likewise fallacious. There is no question of the nature of the property under discussion. It consists of casing in the well, the derrick,

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[1] Since the Government's position was perfectly clear throughout the trial the failure to amend would constitute, at most, simply a procedural defect which could be cured at any time by amendment. R. S. sec. 954, 28 U. S. C. sec. 777.

[2] It is doubtful whether such burden did rest upon the Government since the question here related to the determination of compensation, and, in condemnation proceedings brought by the Federal Government, the burden of proof as to compensation rests upon the condemnee. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 273 (1943); *John Hancock Mutual Life Ins. Co.* v.

rods, tanks, and other pumping equipment which go to make up a producing oil well (R. 92–93, 112). At the commencement of the argument upon this point the court stated (R. 71, see also R. 72) "This is just a question of law" and the matter was so treated by all parties. Appellee's counsel stated (R. 72):

> I am willing to stipulate the proceedings have begun and your Honor is trying that part of the case which is the court's province to decide. In other words, this is a point that the jury has no concern with.

Since all parties treated the matter as presenting simply a question of law, appellee may not now urge a different theory particularly when, if the question had been raised below, evidence as to the character of the property could easily have been presented *Forester & Kleiser Co.* v. *Special Site Sign Co.,* 85 F. 2d 742, 751 (C. C. A. 9, 1936); *Parrott Estate Co.* v. *McLaughlin,* 89 F. 2d 188, 190 (C. C. A. 9, 1937). Moreover, the understanding of the parties was clearly correct. The nature of the property was undisputed. It was a pure question of law whether oil production equipment was legally a part of the realty in condemnation proceedings.

Thus the ground upon which appellee seeks (Br. 33–37) to distinguish *Big Sespe Oil Co.* v. *Cochran,* 276 Fed. 216 (C. C. A. 9, 1921), *Cortelyou* v. *Baker,* 182 Cal. 168, 187 Pac. 417 (1920)[3] and the other authorities

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United States, 155 F. 2d 977 (C. C. A. 1, 1946); *Westchester County Park Commission* v. *United States*, 143 F. 2d 688, 692 (C. C. A. 2, 1944), certiorari denied 323 U. S. 726 (1944).

[3] The case was remanded solely for the purpose of excluding from the real property certain tools, etc., without affecting the

relied upon by the Government (Br. 21–25) lacks merit. Appellee's remaining contention is that because of the lease clause permitting the lessee to remove this equipment, it constituted trade fixtures which were personal property (Br. 37–40). But as we have already pointed out (Br. 24), the fact that fixtures are, by lease provision, treated as personal property between landlord and tenant does not mean that they are not part of the realty for purposes of condemnation. This was recognized in *People* v. *Church,* 57 Cal. App. 2d 1032, 136 P. 2d 139 (1943) the principal authority relied upon by appellee (Br. 38–39) where the court repeated the statement made in *City of Los Angeles* v. *Hughes,* 202 Cal. 731, 737, 262 Pac. 737, 740 (1927) that—

> It has often been held that property affixed to land which, as between the parties shall be deemed to be personal property, still retains its natural character of realty as to third persons.

The *Church* case was a suit by the State to recover the value of the equipment of a retail gasoline and oil service station which the lessee had removed when the land was condemned. Plainly, that decision does not support appellee's claim here.

B. In any event the improvements were condemned as of September 1942 under the amended complaint

As we have shown (*supra,* pp. 2–3) inclusion of the equipment as part of the realty was not an afterthought but was contemplated from the beginning of

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holding that houses, boilers, and engines were real property (cf. Appellee's Br. 34).

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this proceeding. This is evident from the fact that physical possession was taken in September 1942 of the equipment as well as of the land on which it was situated (Appellee's brief, p. 2; R. 33, 133, 151); see *United States* v. *Certain Parcels of Land, etc.,* 62 F. Supp. 1017 (S. D. Cal. 1945). The telegram of 1945 was offered for the purpose of showing that such had been the intention of the acquiring agency. The existence of such intention was purely a fact question in proof of which the telegram was clearly admissible in evidence. Appellee's argument (Br. 40–46) that the amended complaint cannot relate back to the date of the original taking is based upon the assertion that such amendment was an afterthought. Since this assertion is contrary to fact, the argument falls. Moreover, appellee has not referred to any authority nor given any reason why the adoption and ratification of the physical taking of this property did not relate back to the original date of taking. For the reasons stated in the Government's opening brief, pp. 27–30, we submit that, under the amended complaint, the property was taken as of September 28, 1942.

II

THE TRIAL COURT ERRED IN ADMITTING AND IN REFUSING TO STRIKE SEPARATE EVIDENCE OF THE MARKET VALUE OR REPRODUCTION COST OF THE OIL WELL IMPROVEMENTS

Appellee seeks to support the judgment below on the ground that the right to extract oil "had a market value without the existence thereon of production equipment" (Br. 9); that the equipment also had a market value of $18,000 for the purpose of sale (Br.

10); and that the highest and best use of the property "was Removal from the Oil Well of the Trade Fixtures and Personal Property and Their Sale Upon the Open Market" (Br. 22). This represents an attempt by appellee to reverse completely the position taken in the court below and, hence, the contentions are not supported by the record.

There is no evidence to indicate that the bare right to extract oil, divorced from production equipment, had value. As pointed out in the Government's opening brief (pp. 34, 6–7) appellee's witnesses arrived at a value for the well from a prediction of production to be anticipated. While the witnesses asserted that their figure did not include the equipment, Block, himself, admitted the obvious fact that his estimate of future production was based on using the equipment to get the oil out of the ground (R. 151, see also R. 247, 264). In his argument to the jury, appellee's counsel stated (R. 445) "you can't have a going well unless you have all this personal equipment." Appellee's assertion that the oil well would have value "if there were not one bit of production equipment located thereon" (Br. 26–27) is only true if the anticipated returns would be large enough to justify the expense of placing the equipment there. There is no evidence that such was the case here.

Rather than valuing the equipment on the basis of the cash amount that could be received upon its sale, appellee resisted the introduction of such evidence. The Government sought this information on cross-examination of appellee's witness Rush. *Ap-*

pellee's counsel objected, stating "This condemnation is taking over an oil well which is the same as a going business. We are not considering here something that has been dismantled or that you can only get upon dismantling" (R. 215). Again appellee's counsel said (R. 222) "This isn't a case where the jury is to determine the market value of personal property after it is taken out of a well and to be considered separate from its use in connection with the well." Such was the position taken throughout the trial (see R. 384, 410, 445). We submit that under these circumstances appellee cannot now urge that "the highest and best use at the date of taking from a dollars and cents standpoint would be the removal of the trade fixtures from the well and the sale thereof" (Br. 10).

Thus, appellee's argument has no tendency to prove that the rulings below permitting admission of evidence of separate value of the elements that were included in the producing oil well were correct. For the reasons stated in the Government's opening brief, pp. 31–35, we submit that they were erroneous. Appellee argues (Br. 20–22) that the issue of separate value was tendered by the amended complaint. This is simply another form of the contention that the Government abandoned or waived its contention that separate valuation was not permissible. For the reasons already given (*supra,* pp. 2–3) the contention lacks merit.[4]

[4] In his statement of the case, appellee places emphasis on the fact that certain testimony was not objected to by the Government

III

THE VERDICT AND JUDGMENT ARE NOT SUPPORTED BY EVIDENCE

Appellee's argument that the verdict and judgment are supported by evidence simply reiterates the theory that the opinion of value of the oil well and of the equipment valued separately may be added together to produce a total (Br. 27). As we have pointed out in the opening brief (Br. 35–39) those two elements represent inconsistent theories and the suggested addition results in double recovery. The various estimates of separate value of the equipment do not represent the cash amount for which it could be sold which was at least ⅓ less than those estimates which constitute simply a theoretical value in place. Thus, appellee's statement (Br. 30) that appellant could shut down the well, remove the equipment "and sell or otherwise dispose of such items for the cash consideration upon the open market for something in the neighborhood of $18,000" is not supported by evidence. The only opinion upon this matter was that of appellee's own witness Rush that, eliminating the

(Br. 5, 6). But no argument seems to be made that the Government's contention was thereby waived (see Br. 19). Plainly it was not since the Government's position was made clear to the court at the beginning of the trial (R. 69–133), it was reiterated in objections to evidence and motions to strike (R. 176–179, 211–212, 248, 411, 431–433) and was again asserted in support of the motion for new trial (R. 493–544). Thus, the Government consistently maintained this position throughout the proceedings in the court below and it was so understood by all parties. The question was, therefore, properly preserved for appeal. *Salt Lake City* v. *Smith*, 104 Fed. 457 (C. C. A. 8, 1900).

casing and liners which could not be removed, the value of the equipment was only $12,260 (R. 226–228). This estimate made no deduction for the expenses of abandonment involved in such a process, which would total some $1,600 to $1,800 (R. 427, 429–430) and does not appear to deduct the expenses of removal.[5]

CONCLUSION

It is submitted that the judgment appealed from should be reversed and the cause remanded for new trial.

Respectfully,

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[5] The importance of this consideration is shown by Wents' testimony as to the derrick that had it been "down on the ground ready to move to another location it would have sold for $1,600.00. Had it been standing over the hole requiring its moving, the purchaser would have to pay $1,250.00" (R. 409; cf. R. 215–217).

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